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This brief essay suggests that the discursive practices associated with Critical Legal Studies and related movements have prescriptive implications for institutional design. The essay, a contribution to a festschrift for David M. Trubek, considers the trajectory of Trubek's work from his engagement with various critical projects to his recent sympathetic interpretation of "new governance" in the European Union. The tacit prescriptive implications of the critical work resonate with some of the distinctive institutional features found in new governance.

David Trubek has played major roles in three important scholarly movements: Law and Development, Law and Society, and Critical Legal Studies. A major theme of his efforts has been critique. Most often, Trubek has allied with or engaged sympathetically those who have challenged mainstream or established discourse in the name of egalitarian and democratic values.

The relation of critical analysis to constructive social practice is an issue that has dogged – some might say, embarrassed -- scholarship for a long time. Some critical scholars disclaim responsibility to consider the practical implications of their work. Others have implied by their adoption of conventional left positions that bear no visible influence of their theoretical work that critique functions only defensively, warding off unreflective conservatism to create a space for unreflective progressivism. Trubek, however, has insisted from the beginning of his career that critique could and should inform practice, while conceding that the ways in which it did so were not fully understood or readily generalized.

Now in the latest phase of his career, he has devoted himself to a project whose main ambiguity concerns, not its practical implications, but the extent to which it involves critique. In a series of collaborations,

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he has provided a sympathetically descriptive account of recent developments in public policy and administration known as "new governance". This move makes Trubek a promising case for reconsideration of the question of the relation of critique and prescription. His earlier, largely critical work was exceptionally articulate about the practical implications of critique. And his current work is much more prescriptive than most practitioners of critical theory ever get. So it's appropriate to consider how the earlier work relates to the later.

In important respects, new governance, in the form Trubek portrays optimistically, is distinctively responsive to the critical themes in his earlier work. There is a normative criterion of political legitimacy in much critical theory. It is occasionally explicit – notably in Jurgen Habermas's work – but more often implicit. The criterion is this: political institutions acquire presumptive legitimacy to the extent that they anticipate and incorporate the discursive practices exemplified by critical scholarship. Legitimate government institutionalizes centrally and continuously in its public decision-making processes the practices of critical reflection and interrogation that critical theory models in scholarship. This general principle leads some more specific ones. When we measure new governance in the manifestations that Trubek approves we see at least important commitments and progress in the direction of these principles.

I first consider what Trubek's earlier work suggests about the practical implications of critique. Then I consider how these implications play out in the case of new governance. Throughout the discussion, I refer to Critical Legal Studies practitioners, as well as the self-identified critical practitioners within Law-and-Development and Law-and-Society, collectively as "Crits".

I. Critical Principles

I start with what I hope will be an uncontroversial summary of key features of critical theoretical practice in the three legal scholarly movements to which Trubek has contributed, and in particular, in Trubek's own work.

1. Anti-foundationalism. The Crits ally themselves with the modernist denial that knowledge can be grounded in some ultimate

reality that exists independently of our efforts to understand. The version central to CLS emphasized a particular variation on this claim -- the indeterminacy of doctrine. It conceded that there were (or might be) abstract values that were compelling and uncontroversial but denied that there was any neutral method which would generate from these values answers to particular conflicts. The Crits emphasized the ways in which conventional legal analysis tacitly smuggled conclusions into its premises by framing issues to bracket some concerns, by selectively invoking governing values to obscure the extent to which they were in conflict, or by dogmatically asserting non-sequiturs.

Law-and-society people tended to treat the indeterminacy claim as too obvious to require demonstration, and they were somewhat surprised and perhaps annoyed that CLS work drew the attention and controversy it did. But Trubek disagreed. Theoretically, doctrinal criticism made an essential, though limited, contribution to explaining the mechanisms by which law legitimated power. Strategically, it seems to have been necessary to engage the legal establishment in the larger critical project. Without it, mainstream legal academics found it too easy to dismiss critique as irrelevant to professional practice.[1]

2. Anti-determinism. To begin with, this principle meant a rejection of the Marxist idea that there is some material base independent of an ideological superstructure and that the base determined the super-structure. More broadly, it disputed that there is a limited repertory of tightly structured forms that a modern society can take. There is no reason to believe that contemporary capitalist societies exhaust the possible range of market-based societies or that the economic productivity of some of these societies necessarily entails their inegalitarian and anti-democratic features.

A lot of critical work has pursued this theme historically; so there has been particular attention to its evolutionary variant – the claim that poor societies must past through a well-defined path to emerge as prosperous capitalist democracies. Trubek contributed to this critique at both theoretical and practical levels. In his work on Weber, he elaborated what the master himself had recognized as the "England problem" – a key counter-example to his contention that capitalist

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[1] David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism,* 36 Stanford Law Review 576 (1984).

development depended on formally rational legal rules (as opposed to the more informal style of common-law judging).[2] In his Brazilian work, Trubek engaged the prescriptive uses of evolutionary determinism. He showed that in the politically and economically oligarchical conditions of Brazil, the prescriptions inferred by the determinists (liberalized capital markets, purposive legal reasoning) turned out not to be conducive to development (much less the democracy for which some had also hoped).[3]

3. Anti-ideology. This is best term I can think of to describe opposition to unreflective privileging of the status quo. ("Utopian" would be another, but it has connotations of both intellectual flakiness and programmatic daring, neither of which is deserved by the Crits.) All of the practices to which the Crits object contribute to this privileging, but two are especially important.

The first is the valorization of the normative commitments proclaimed by established institutions. Doctrinal scholars do this when they assume that the collection of authoritative reference points on particular legal questions reflects some immanent rationality and proceed to construct an account that makes it look harmonious and grounded in basic values. The "gap" scholarship of interdisciplinary scholars does something similar. It focuses on a particular piece of positive law and proceeds to document the extent to which its presumed prescriptive implications are unfulfilled in practice. It then proceeds in one of two directions. Either it suggests that non-enforcement reflects some "latent function" performed by self-equilibrating social processes. For example, maybe the law – for example, prohibition of alcohol -- was a "symbolic crusade" designed to ease the pain of status loss for a declining elite rather than to affect mass behavior. More commonly, the scholar assumes that society would benefit from more enforcement and offers prescriptions as to how to accomplish this. The latter approach is less conservative, but it is still ideological in assuming that there is a social interest in closing the gap simply because the norm satisfies positivist criteria of legality.

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[2] David M. Trubek, *Max Weber on Law and the Development of Capitalism,* 1972 Wisconsin Law Review 720.

[3] David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development,* 82 Yale Law Journal 1 (1972).

The second practice the Crits question is the valorization of social peace and harmony. The Law-and-Society Crits produced a large body of analysis and research in response to policy discourse of dispute resolution. They showed that it is a mistake to assume, as conventional discourse does, that the emergence of disputes is exogenous to the legal system or that their minimization is an uncontroversial social good. Legal professionals do not just respond to claims and grievances; they generate and influence them. Their advice can turn disappointment into indignation, whining into claiming. To the extent that professionals facilitate effective collective action, they may increase confidence and solidarity in ways that reinforce and re-shape claims. Conversely, professionals can also "cool out" clients in ways that reduce expectations and induce resignation. It follows that "dispute resolution" is not necessarily a good thing. Much social progress has required dispute *generation*. And much of what passes for dispute resolution involves the dampening of potentially progressive political impulses. Of course, the distinction between progressive and regressive change depends on political criteria. The Crits' point is that political criteria are inevitable, and they are best made explicit.

Trubek engaged both gap sociology and the dispute resolution literature in his synthetic essays.[4] With respect to dispute resolution, he also contributed directly to the Law-and-Society critique of the "litigation explosion" ideology that portrayed litigation as a metastasizing social cancer. The research showed that litigation was less prevalent and less expensive than conventional rhetoric claimed.[5]

4. Anti-separation-of-powers. Conventional discourse presumes a strong separation between enactment of law and its enforcement. Enactment settles issues of value; enforcement implements the settlement. Enactment occurs through relatively democratic processes; enforcement occurs through relatively technocratic ones. Thus, particular enforcement decisions have democratic legitimacy to the extent that they implement democratic commands. The Weberian view of bureaucracy as a mechanism for automatic implementation of hierarchically-promulgated norms through formal rules fits helpfully into the picture.

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[4] David M. Trubek and John Esser, *Critical Empiricism and American Legal Studies: Paradox, Program, or Pandora's Box,*" 14 Law and Social Inquiry 3 (1989).

[5] David M. Trubek et al., *The Costs of Ordinary Litigation,* 31 UCLA Law Review 33 (1984).

In the legal academy, the picture is complicated by the acknowledgement that enacted law is characteristically ambiguous and therefor requires the interpretive efforts of lawyers and judges. In both the popular and the professional views, the action is at the top – legislators, judges, and elite lawyers make the critical decisions that are then passively implemented by the foot soldiers of the state.

All the Crits insist that the output of top level legislative and interpretive activity remains too ambiguous to determine street-level decisions (and even if it were determinate, top-level officials lack the practical capacity to enforce compliance by subordinates). The interdisciplinary Crits follow the point up by shifting attention to the street level. In myriad studies, they showed that street-level administration is not a process of passive implementation of centrally-determined commands. It is an unmistakably political process in which unresolved value questions are settled informally in ways usually influenced by social inequality.

The interdisciplinary Crits revised the Weberian picture of bureaucracy, but they did not reject it entirely. The difficulties of supervision and the rigidities of rules made bureaucracy a cumbersome tool for most social problems, but a bureaucratic program that would regulate narrowly and tolerate a lot of over-inclusion relative to social need might work. An example was non-means tested public assistance that provided benefits to, say, all families with children regardless of income. But to the extent that more precise targeting was needed, bureaucracy would not work. In the tradition of social theory, the prominent alternative was Durkheim's idea of public service professionalism -- discretion canalized by socialization and peer review. Unfortunately, another body of research showed that such street level public servants often exercised discretion in irresponsible and oppressive ways.

Trubek was not directly involved in the Crit work on street-level administration, but he was strongly associated with it. His Wisconsin colleague Joel Handler was a key figure. And so was Louise Trubek, both as scholar and practitioner.

II. Practical Implications of Critique

The way to infer the practical implications of this critical practice is to ask what kinds of institutions would be immune to it. Not immune in the sense that the institutions had solved all the problems that critique might reveal. But immune in the sense that the institutions had fully internalized the critical practices. Or coopted them in the sense, not of neutralizing them, but of incorporating them full bore into its standard operating procedures. Taking this approach, we can infer four conditions of presumptive political legitimacy. I have named the four conditions after friends, collaborators, and people whom Trubek has acknowledged as influences. The four conditions do not constitute a complete political vision. They presuppose some variation of the conventional elements of liberal democracy, such as fair electoral process and civil and welfare rights. But they add an additional set of criteria sometimes overlooked that critical theory emphasizes and deepens.

1. The Habermas condition. Public norms should ideally be based on consensus among affected citizens derived through a process of open, respectful, and non-coercive discourse. Crits in the U.S. legal academy have been ambivalent about Habermas and the discourse principle, but Trubek suggested in 1984 that they might need it.[6] The consensus ideal responds to the practical dilemma that follows the rejection of foundationalism. Consensus is modernity's substitute for traditional and rationalist normative foundations.[7] While the Crit reservations are important (see the next condition), they don't leave the idea without utility.

Consensus is not a pre-requisite for collective action. It is impractical for most decisions, and it would be unjust to give those who benefit from the status quo a veto over proposed changes. The consensus condition just means that we should seek consensus to the extent that is practical and we should have more confidence in our judgments to the extent that we achieve it. The condition is a useful heuristic even though it is unlikely ever to be fully satisfied for any complex problem. As long as we can measure the proximity of actual circumstances to the consensus ideal, it can serve as a useful measure of legitimacy. Note this approach differs from claims of legitimacy based on the imagined possibility of consent in some hypothetical situation like

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6 *Where the Action Is,* cited in note , at 597-98.

7 *See* Maeve Cooke, *Habermas and Consensus,* 1 European Journal of Philosophy 247 (1993).

the Original Position. Here we measure legitimacy by the distance between idealized consent and the quality of consent in the actual decision-making process.

2. The Kennedy condition: This condition is the negative implication of the Anti-Foundationalist position. It requires that public policy and practice be formulated and implemented with maximum feasible self-consciousness and transparency. Official decision-makers should forbear from efforts to give their conclusions a veneer of necessity or entailment. There are many Crits whose names we could plausibly attach to this condition, but I name it after Duncan Kennedy because he has been a major influence on Trubek and because he is probably the legal scholar most identified with the position that critique tends to have progressive political effects.[8]

Kennedy's critical practice has been focused on elite judicial and academic discourse. Some Law-and-Society scholars carried on this project at the level of street-level discourse of low-status lawyers and low-level public officials. With their work in mind, we could have called this principle the "Amherst condition" after the group of scholars centered in Amherst, Massachusetts, whose work Trubek analyzed admiringly (and whose anxious relation with Kennedy Trubek sought to mediate).[9]

But from either the top or the bottom, the condition is the same. For official decision-makers and their apologists, it requires self-consciousness and candor about the inconclusive and conflicted nature of the authority they invoke, recognition of relevant competing values, and acknowledgement of the political quality of the decision-making process. For advocates and advisors, it means willingness to acknowledge their own relevant interests and anxieties, to empathetically explore their clients concerns, and to frame advice in a way that maximizes clients' understanding of the range of possibilities and the nature of the constraints that they face.

3. The Unger condition: Entrenched social practices and structures should be subject to institutionalized pressures that encourage challenge and induce re-examination. This condition resonates with the rejection of ideology. It is named after Roberto Unger, another Trubek

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[8] *E.g.*, Duncan Kennedy, *Critical Labor Law Theory: A Comment,* 4 Industrial Relations Law Journal 503 (1981).

[9] See *Critical Empiricism*, cited in note

friend whose work exalts the individual and social capacity for self-transcendence.[10]

The Unger condition requires the protection and, indeed, encouragement of diversity in public and private life. In the public sphere, it requires opportunities to challenge concentrated private power through antitrust-type protections and irresponsible public agencies through means such as "public law litigation". In social life, it prescribes a kind of education that develops a capacity to thrive in circumstances of diversity and to distance one's self reflectively from convention.

The Unger condition is designed as an antidote to the tendency of consensus and cooperation to congeal into unreflective and dysfunctional conformity. It is, of course, potentially in tension with the Habermas condition, and managing that tension is a critical goal of institutional design.

4. The Sabel condition: Institutions and programs should be designed so that their purposes can be re-considered and elaborated in the course of implementation. Institutions should facilitate learning, self-assessment, and re-orientation. They must combine transparency and provisionality. Institutional goals should be articulated along with performance measures, and both goals and measures should be reconsidered continuously in the light of experience. Practice norms should be fully explicit, but they should not require agents to take actions that contravene the purposes of the program. When rules conflict with purposes, the response should be neither counter-purposive compliance nor low-visibility adjustment. The agent should disregard the rule and take the action that furthers the programs purpose, while triggering a process of review that, if her judgment is sustained, leads to the prompt elaboration of the rule to take account of the new contingency. Peer review and the duty-to-explain take the place of Weberian rules in controlling discretion. The Sabel condition erodes the distinction between free-standing organizations and federations or associations of organizations. The techniques of rolling rules and peer review can be applied across organizations as well as within them.

The continuously self-revising organization (a/k/a lean production, learning organization, self-managing organization, evidence-

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[10] *E.g.,* Roberto Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy 277-312 (1987).

based practice) has been shown especially effective in the private economy with products and markets that require strong customization and/or frequent adaptation to new circumstances. Many public problems now seem to call for the same contextualizing and adaptive capacities in government organizations. From the point of view of liberal democracy, some variations of these organizations are appealing because the qualities that make them efficient in dealing with some problems also make them conducive to democratic accountability. Such organizations encourage lower-tier administrative creativity and stakeholder participation, and they make practice broadly transparent in ways that facilitate accountability to upper-tier administrators, coordinate political institutions, and the public sphere.

The Sabel condition is a negative implication of the rejection of the separation of powers, and more generally, of the distinction between enactment and enforcement. It is named after Charles Sabel, who has insisted on the pertinence of "continuous improvement" models of private organization to the public sphere, and has specifically used such models to develop an account of the European Union.[11]

III. New Governance

The "new governance" idea arises from convergent efforts to understand the expanding roles of international organizations, the evolution of the European Union, and the trend toward decentralizing reforms in policy implementation in a variety of countries, especially the U.S. and the U.K. These developments have many variations, and there are many interpretations of their general significance. The work on the EU to which Trubek has contributed has been cautiously optimistic, and it thus converges with work on international organization and domestic policy reform that views at least some manifestations of the new developments as promising. I will not try to assess the plausibility of this cautious optimism about the EU, a task complicated by the current economic crisis. I will limit myself to pointing out those features in

[11] Charles F. Sabel, *Learning by Monitoring*: *The Institutions of Economic Development*, in Handbook of Economic Sociology (Neil Smelser and Richard Swedberg, ed.s 1994); Charles F. Sabel and Joshua Cohen, *Sovereignty and Solidarity* in Governing Work and Welfare in a New Economy (Jonathan Zeitlin and David Trubek, ed.s, 2003).

Trubek's account of the EU that seem responsive to the institutional implications of critique. (I attribute these ideas only to Trubek, even though he developed them in a series of collaborations, and I don't try to take account of how the ideas overlap and resonate with the large new governance literature. Trubek might have preferred a less Trubek-centric account, but that is not what the occasion calls for.)

1. The Habermas condition. Legally, the EU is an intergovernmental organization. Traditionally, intergovernmental organizations operate by consensus among member nations, as represented by their diplomats. As the EU has evolved away from this traditional form, the consensus norm has been diluted, but it continues to exert influence. Nonconsensus decisions still require a kind of super-majority ("qualified majority"), and they can be made only across a limited range of competences. At the same time, engagement across member states has thickened, including not just senior executives, but a European parliament (though it does not figure in Trubek's picture) and a series of committees and agencies in which mid-level officials, experts, and NGO delegates participate. This combination of a diluted consensus norm and a thickened range of cross-national engagement would seem to push the EU along a deliberative path.

Trubek has been especially interested in the phenomenon of "soft law". The EES and the OMC create basically procedural duties, and even these are not enforceable in any tangibly coercive way. Yet, they seem to have motivated substantive change. Trubek has analyzed how soft law duties might motivate action. They include "shaming" (fear of peer disdain), "mimesis" (a desire to justify your conduct as conventional) and "discursive transformation," which Trubek, following Kirsten Jacobson, describes as "the construction of 'a new perspective from which reality can be descried, phenomena classified, positions taken, and actions justified'."[12] Shaming and mimesis sound more like Durkheim than Habermas, and discursive transformation sounds uncomfortably like Foucault. But Trubek also suggests a more Habermasian interpretation in which new governance succeeds by "by bring[ing] people with diverse perspectives together in settings that

[12] David M. Trubek and Louise G. Trubek, *Hard Law and Soft Law in the Construction of Social Europe*, 11 European Law Journal 343, 357 (2004).

require sustained deliberation about problem-solving" that leads them to "collectively redefine objectives and policies."[13]

2. The Kennedy condition. Trubek sees the post-Maastricht EU developments, especially the European Employment Strategy and the Open Method of Coordination, as cracking open conventional legal and political understandings. "[T]raditional principles of legitimacy drawn from state-based models do not work at the European level and may be obsolete at the national level as well."[14] Notably, there is no visible unitary sovereign to which authority can be attributed. Opponents of the EU attack it for failing to conform to conventional assumptions, and defenders strain to reconfigure or portray it as only a modest departure. But Trubek suggests that practical policy discourse in this terrain has been (or is likely to become) significantly unencumbered by ideological baggage and more open and reflective.

If true, this could be a transitional phenomenon of the sort we expect in moments of dramatic reconstruction but that typically wanes as new institutional forms are consolidated. But some of the "mechanisms that destabilize existing understandings" in the new arrangements might operate long term. In particular, there is the commitment to diversity (the Unger condition) and to experimentation (the Sabel condition).

The new governance forms to which Trubek drew attention require policy makers both to tolerate and to take account of diverse perspectives and practices. Decision-makers come from different national cultures. Trubek points out that the problems with which EU social policy has been pre-occupied straddle the boundaries of academic discipline and agency jurisdictions. This straddling contributes another dimension of diversity. The thinner the base of shared assumptions, the greater the pressure to explain, and thus to reflect, on premises that might otherwise be taken for granted. Moreover, the need to take account of the range of viable institutional forms in member states subverts the tendency to under-estimate the range of viable institutional forms. At the same time, the experimentalist dimension of these reforms requires that deliberators submit their premises to the test of experience. This might subvert tendencies to fundamentalist dogmatism.

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[13] Trubek and Mosher, cited in note , at 357.

[14] Joanne Scott and David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 European Law Journal 1 (2002).

3. The Unger condition. This condition stipulates that consensus must not come at the expense of the kinds of diversity that stimulate awareness of a broad range of possibility in culture, politics, and the economy. Trubek sees the commitment to diversity as a major strength of the EU. EU consensus is a thin or overlapping consensus that contemplates and indeed protects diversity among and within member states.

Expansion has brought increasing diversity among member states, and association appears to have some influence on protection of diversity within member states. The admission process appears to have had a significant liberalizing effect on expansion states. And some of these pressures appear to continue among member states. Gender equality and social inclusion are among the declared goals of the European Employment Strategy, and there are metrics associated with them.

A pertinent theme in judicial review of administrative action is reduced attention to questions of competence and authority in favor of concern with representation and inclusiveness. For example, Trubek sees the EUAPME case as potentially adumbrating a quasi-constitutional principle that would condition recognition of the normative output of stakeholder regimes on adequate representation of affected interests.[15]

4. The Sabel condition. Trubek has explicitly interpreted the EES and the OMC as examples of Sabel's idea of experimentalist or directly-deliberative governance.[16] The basic elements are: general agreement on goals and measures of progress toward them, followed by member state plans, self-monitoring, and reporting to the EU; followed by peer review, followed by reconsideration and re-elaboration of goals and metrics. All part of a continuous cycle. More recently, Trubek has interpreted developments in international law, particularly around the WTO treaties, in terms of collaborative problem-solving.[17]

As Trubek notes, this approach precludes any strong distinction between rule enactment and rule enforcement. Efforts to implement the

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[15] Scott and Trubek, cited in note .

[16] Trubek and Trubek, cited in note , at 348, *UEAPME v. Council of the European Union,* European Court of Justice, Case T-135/96 (1998).

[17] Patrick Cottrell and David Trubek, *Law as Problem Solving: Standards, Networks, and Experimentation in Global Space,* 21 Wisconsin Journal of Transnational Law and Global Problems 359 (2012).

norms lead to greater understanding of them both through local experience and through the pooling of experiences in the peer review process. Political accountability is re-configured. Traditional legal theory emphasizes a backward-looking process in which courts confine administrators to the mandates of generalist legislatures. In the new processes, accountability is more specialized and more prospective. On the one hand, it occurs through the deliberative horizontal engagement of parties with special interests and expertise. On the other, it defers to legislatures by making its activities transparent to oversight by traditional democratic institutions.

IV. Conclusion

Readers are struck by both the range of Trubek's scholarship and its continued engagement with new events and ideas. Trubek has never sought the benefits of narrow expertise or yielded to the temptation to rest on early triumphs. Yet, there is also a notable continuity in his work. Few people have been more ambitious in their efforts to bring critique and prescription together. It remains to be seen whether new governance will prove a durable set of innovations. It does, however, seem deeply responsive to the prescriptive implications of Crit scholarship. No doubt this is not the only programmatic response that could be derived from the critiques. But thanks in important measure to Trubek, it is the most elaborated one.